

LTBB CLOSED SESSION RECORDING OF 5/06/2007-OPENED AS MOTION BY TRIBAL COUNCIL ON APRIL 6, 2014

The following is a transcription of a Tribal Council closed session. The following Councilors and Office staff that we audible on this transcription will be identified as follows: Councilor Bea Law, **BL**, Councilor Fred Harrington, **FH**, General Counsel James Bransky, **JB**.

"...." – means speaker interrupted during comments.

"(Undecipherable)..." means that transcriber cannot understand speaker(s).

BL: Jim this is in regards to the Keno? Where we're at and such?

JB: For the people that were here at the work session a week ago you will have to excuse my redundancy, but I think it's probably good just to start from the beginning of this phase. Anyway a week ago Friday, Judge Miles came out with the ruling that I think Frank emailed everyone. It really surprised all of us including the State, because he ruled in favor of the state on the motion saying that we don't even have to go to trial... and the basis of this ruling was something that no one even attempted to argue. If he said that under the Clause where it says no other person operates commercial gaming...no other person except the parties of the contract. Meaning that the State categorically excluded...from the...clause according to Judge Miles ruling. The State could do whatever it wanted to get the law changed...whatever...it could do that because its excluding no other person means no other according to the Judge; no other person means the State and the Tribes. Not everyone has been negotiating, including the State Negotiators... understood the State to be subject to that provision. The State had arguments of whether Club Casino was a commercial casino game or not and if we needed a change in the law before the 8% payments would terminate but they never tried to argue that the State...was included at all. I shouldn't...for some reason say never. They did show us that argument when we were fighting over the escrow and drafted. They never rose in it in their motion for summary judgment and I assume that the depositions of all of their negotiators said well of course the State was subject to the provisions and no other person meant, no other person besides the tribe. The State thought it would harm their credibility to try to make that an argument. To none the less judge miles ...the state basically is exempt from the...clause. One of the initial problems with that from a legal perspective; is Judges generally are not allowed to raise arguments on their own. With limited exceptions Judges are supposed raise subject matter jurisdiction on their own even if no party raises its head if there is a case that's isn't supposed to be in their Court...jurisdiction to hear...standing parties can raise that on their own...depends on established standing to be in their Court. But other than that Judges are...Once a Circuit Court case is referred to that...because the parties have not had the chance to address them. So now we need to decide what to do with this decision and the choices basically would be to file a motion for reconsideration within ten days within the Judge's action or filing an appeal with the 6th Circuit Court of appeals with 30 days with the entry of the Judgment. Generally the thinking is that

there's no point in going back to Judge Miles and asking him for reconsideration. We could go and have some...you did not give a chance to argue this so here is the information as to why the state is not excluded from section 17 of the Compact. Given his opinion and the fact and he also put in the provision saying...that wasn't the case...find that it is a commercial casino game. There does not seem to be a point of going back to him and have him say the same thing and have him shore it up. To reason to do so would be to get items on the record it for an appeal. There is some flaw and we are making sure that we don't have to put other things in the record and raise the argument before going on appeal. But basically at this point...consents this would be the next step would be just to file. The appeal I feel that it is real important it to get rid of this other analysis even if we win or lose ultimately...Commercial casino game...if we don't appeal this opinion, this opinion is the law and then the State could go to the casinos and collected the 8%.

BL: That's right

JB: So I think it is...you know regardless of the ultimate outcome just for that reason alone...keno...and try to get remanded for a trial hopefully after Miles retires. I heard he 85 and another attorney says he is in his 90's.

BL: Oh wow!

In case our research does indicate there's some advantage of doing a reconsideration motion for additional things we want to record, by I suspect that where were heading would be just to go straight to the Court of appeals but it helps to have the flexibility to authorize whatever collective wisdom is of the chair people of the legal team on this. So that's the long and short of it. This was really a bizarre decision that didn't seem at all in keeping with.

BL: What was originally said?

JB: ... on the bench about...passing this State Law...isn't this a whole new thing you keep advertising?like I said this other person is...everyone. The States own negotiators would not support that. We think there is enough information in the record but we...reconsider motion...Were studying that.

FH: *...Talking over one another and inaudible...*

BL: *....Talking over one another and inaudible...*

JB: And that's a mess and our amendment including the...of the State Lottery is in the amendment it is not in the original.

BL: Aren't those...inaudible...

JB: But the amendment is still pending before the Michigan Supreme Court but it is strange his treatment of the amendment, because he sort of cited it in his opinion and then he kind of said it is not clear of the status of it is right now and at any rate it is something that the parties were

doing after the fact. Well yeah, after the fact but then it is something signed by both parties in binding by both parties if the Michigan Supreme Court upholds it? So it's very bizarre that he simply ignored the amendment. And also in the original Compact it does have the phrases that say except for Detroit and other Indian tribes. And then his analysis that this provision that he says is what the provision the only interpretation is ...he doesn't even address those provisions. We have already consulted a couple...to make sure that it was truths check of our thinking. You know, maybe were missing something in this language?...neither one of us support the Judge at all. We've talked to Randy Valentine whose and expert in Native languages at the University of Wisconsin and he already said that after looking at this for a few hours. He definitely says that the Judge interpretation is the on the only one the grammatical construction is...no other person except the Tribe.... He immediately said No...there is three possible ways to look at this the only you would know and then go and find out what the parties intent was. If the "other person" could refer both. If grammatically the Judge...what the Judge saysit isn't true. So then they basically...the confidence that exists if we should appeal.

BL: Ok is there any other questions for Jim in regards to this

FH: ...Are we barred now...

JB: Other arguments with...what we value...for instance...for doing Club Keno at all saying that's illegal under state law. That would have to be a separate suit.Or not do under state law we haven't analyzed that we just know their doing it and its Commercial Casino Games so we shouldn't pay the 8% under our contract.

FH: ...Then you say well were not going to pay anyway if...

JB: I don't think the ramifications of anything illegal will affect the 8%. I think that just depends on whether or not it is a Commercial Casino Game or not. And whether we can get rid of this "other person", nonsense. I think the ramifications there is that the State is would have to stop offering Club Keno.

FH: (Inaudible)

JB: It still comes down to whether it is a commercial casino game. It could be illegal if it is a commercial casino game. I think it is a commercial casino game in this instance...like competitive hopscotch...there could potentially be something that would be illegal for them to allow...there are separation issues whether we pay or not. The legality issues speak to whether or not they can do it.

BL: What was the...are you done Fred.

JB: You know if they can't do it my guess...and they wouldn't...that could be a possible negotiating chip with...actually attacking their Club Keno...but I don't see a way of bringing the legality of Club Keno into this case.

BL: So beyond the...6th circuit like we did with Judge Miles.

JB: (talking over one another)

BL: What beyond the 6th Circuit Court

JB: The next step would be the United States Supreme Court. But it would be unlikely they would take the case because it is the Tribe and the State contract...It has to do with State laws opposed to something where there is an issue of national concern or other circuit courts disagree. In all likely hold the 6th Circuit would be the end of the road...the 6th Circuit could bring it before the judge in other grounds. They could say the judge got it wrong on the "Other person" business but right on...but the lottery is exempt from it can't by designation do commercial games or whatever, so even if we get them overturned of the analyst of other person...it does not necessarily give a us a victory in the 6th Circuit Court The impact I think the State will only give lip service to the "other person"...because I think they know that that just isn't the viable decision. Now that the Judge may want to defend it but I think we should be focusing on the other argument...Miles could have said we are right because the Lottery can do whatever it wants without changing State Law.

FH: (inaudible)

JB: Started running...is the decision...record to make it right for appeal.

FH: (inaudible)

JB: Not yet, by I would shortly expect it. If at this point if the state were to, you know come back and try to say that you guys might try to appeal but right now we have a really good...you can't keep the money...my recommendation would be to offer to put it in a former escrow or place. There posted in appeal by...you know something with a neutral party as opposed to them having it right now. And I think they would agree to that because the danger is the Court's exercising jurisdiction here and under the position of the Indian Gaming Regulatory Act as state action begins...Try to enjoin this facility in violation of the Compact. We agreed with the State from the beginning that they were really not trying to shut us down. But if they really wanted the money and wanted to play hardball the State and say ok...that we won this round we want you to shut you down unless you turn the money over. So I think that they demand the money and I would be surprised if they don't soon. I would thing that middle ground, would be to say we'll put it in a formal escrow.

BL: Did you discuss Jim Riley emails.

JB: Another thing they might be waiting on ...they still want to get their hands on the money as the appeal may be overturned and it might be a trial in a couple of years and that could be appealed. So my own opinion this would effectively put themselves to the 5 years and if we prevail on appeal or not. Or even more if we did prevail and there was a trial. This opinion really

put things back a ways. So the State in emails indicated that they are still willing to talk with us to try to end this once and for all. I can't imagine they...the opinion that they got they would come up with very good offers...we will see what they have to say and I will report back to you. The one thing that Donna mention...maybe some kind settlement where we agreed on the interpretation of the Compact may clear where that line is between what they're allowed to do in a commercial casino might be beneficial but I guess we need to see how seriously they want to talk. There are two schools of thought here...1. There is so much money that we may get it overturned and 2. Another way of looking at would be that Keno...while it is a commercial game but doesn't significantly cutting into our business that much. Maybe we could cut sort of deal with the State that at least gets us some money and draws a line at what they can and cannot do...That would be something worth discussing, I guess we need to see what ballpark the State is in and report back to you see if its anything that is worth considering or not...certainly makes sense.

BL: There is going to be a conference call tomorrow at 1 o'clock, right?

JB: Correct. Little River will have a similar meeting with their Tribal Council by tomorrow. So the idea tomorrow we would know.

BL: They were actually going to meet right away but because we do have Council on the weekend they held off...and we do have a resolution for this afternoon and you and Donna gone over that as well?

JB: Yes Donna was able to talk to me about it and I appreciate the way she drafted it because I was initially thinking I'd just ask for a resolution for an appeal but there is research in the next few days as we think that the reconsideration motion prior to the appeal makes sense. It doesn't seem that way but it would be nice to have that option and also just to confirm that we would also still have authority to keep...to see if there is any fruitful ground for negotiation or not.

FH: Inaud

JB: That was their initial take on it and it was our entire take but it is still on the record that we need ...to look at the case law to see if we have any argument to that we would be forfeiting it on appeal if we don't take it to the lower court and now...discovery skirmishes over the escrow and all and whether or not we had to turn over our feasibility studies we already...and to get the State Deposition testimony into the record at the where their negotiators acknowledge that the State was subject to the exclusionary clause. So I think we have everything that we need in the record now and it wouldn't be taking the risk of Miles a stab of writing some more things that could be negative. We just want to double check all of that before making the final decision. He certainly is not going to change his mind and the only reason to do it would be if we had to do it to get more material into the record before taking it up to appeal. David from...from Randy Valentine into the record. We looked at it hard and decided would be helpful. But now it looks like the record has nothing is shows the State a...the fact that the State would even argue this as

there is disposing testimony that would fly in the face of Miles opinion the deposition has to ...from the States negotiators I think its sufficient where were...consideration motion probably isn't warranted but I do appreciate the way donna drafted the resolution to give us some the flexibility to give us some research to determine to see if there is an advantage to doing that.

BL: the interpretation of the linguist and the talk of some appellate....

JB: One thing we had talked about is whether it makes sense as when your involved in a case you it's important to always keep your mind on what the other side is thinking what you would be arguing if you were in their shoes.are these men living and breathing the case you get really held up by a year. So one suggests was maybeHow an expert looks at this that are family with the case and are objective. Law professor kind of analysis and I guess maybe...as it's within the already existing budge...if we could do this as it wouldn't necessarily to be a contract with the Tribes. But I think that a call probably we need to make as we make...with them spending the money makes sense...maybe 10 or 20 thousand dollars range to have some outside objective...what they would argue. I'm not convinced that that is good at this point...wiling to argue.

BL: Ok. Maybe that will be decided tomorrow?

FH: If we were to...resolution would we...

JB: Roughly.

FHL And if we have the budget...

JB: Yes, the money is defiantly there and how much would be left over for the trial if we will I think we would still need some and then there's just the annual appropriation so if we do win and have a chance a chance to go to trial we should have some of the money. I am pretty sure I would have to come back for a supplement request. Two years down there road...we may need it for appeals. We do not know until we try with the expert witnesses and all that.

BL: is there any more discussion for Jim? If not we will go out of closed session please switch tapes.